No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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Comes now the United States of America, Appellee in the above entitled cause, and presents this, its Petition for Rehearing, as to Count One of Indictment No. 20069 and as to the single count pleaded in Indictment No. 20604.

Preliminary.

In his Brief and oral argument, Appellant stressed contentions which have been decided adversely to him by this Court in its Order affirming the Judgment of Conviction on Count Three of Indictment No. 20069. In oral argument, counsel for Appellant conceded that if the conviction was good as to one count, it was good as to all counts. In the light of Appellant's stress upon issues which he charged to be controlling, Appellee devoted its Brief and oral argument to rebuttal of Appellant's major contentions, and here presents its argument upon points made by the Court in reversal of the first count of Indictment No. 20069 and the single count of Indictment No. 20604.

STATEMENT OF GROUNDS FOR REHEARING.

The Opinion of This Honorable Court, Insofar as It Relates to Reversal of Count One of Indictment No. 20069 and the Single Count of Indictment No. 20604, Invades the Province of the Jury Which Had the Exclusive Right and Duty of Weighing the Evidence Admitted in Proof of the Two Counts With Which This Petition Is Concerned.

In its Opinion the Court stated:

> "The evidence fails to establish beyond a reasonable doubt that appellant falsely represented himself to be a citizen of the United States. A person may be born in the United States and remain therein for life and yet not be a citizen and while it may be that an officer, upon being informed by one whom he has under arrest that he, the party in custody, was born in the United States and had lived therein all his life, would conclude that the person whom he was interrogating was a citizen of the United States, it would be no more than a conclusion reached without the necessary supporting facts."

The Court has thereby based its decision as to the two counts involved in this Petition upon the ground that although the respective police officers "would conclude that the person whom he was interrogating was a citizen of the United States," the conclusion would be reached without the necessary supporting facts. The Court has further stated that the answer given by Appellant that he was a "citizen" does not establish that he falsely represented himself to be a "citizen of the United States." The decision of the Court appears to be that a representation

that one is a *citizen* of *"American"* nationality *born in New York* with residence in the United States for life does not add up to a representation that such a person is a citizen of the United States. It is submitted that any person asked the question as to whether he is a citizen, in making an unqualified reply that he is, thereby makes a representation that he is a citizen of the country in which the inquiry is made. That the combination of answers given by Appellant necessarily add up to a total of "representation of citizenship" is apparent from Article XIV of "ARTICLES IN ADDITION TO, AND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION." Said Article, insofar as pertinent here, reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *"

In its comment upon the law established thereby, 14 Corpus Juris Secundum, at page 1150, states:

> "a. Presumptions and Burden of Proof.
>
> "In the absence of proof to the contrary a person is presumed to be a citizen of the country in which he resides, but, where it appears that a person was born in a certain country, there is a presumption that he is a citizen or subject of such country until there is a showing to the contrary.
>
> "In the absence of proof to the contrary every man is considered or presumed to be a citizen of the country in which he resides. * * *."

The leading case appears to be *United States v. Wong Kim Ark,* 169 U. S. 649. Wong Kim Ark was born in the City of San Francisco, California. His parents were Chinese and subjects of the Emperor of China. Wong Kim Ark resided in California until he was a young man when he visited China. When he sought to return, the Chinese Exclusion Act was raised as a bar to his re-entry. At page 906, it was said:

> "* * * The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons of whatever race or color, domiciled within the United States. * * *."

Also, at page 910, it was said:

> "The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there

> carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that *the question must be answered in the affirmative.* Order affirmed."

The same rule is announced in *In re Gogal,* 75 Fed. Supp. 268, as follows:

> "A person who is born in the United States, regardless of the citizenship of his parents, becomes an American citizen not by gift of Congress but by force of the Constitution. U. S. C. A., Constitutional Amendment 14, Section 1."

It is a familiar rule that special exceptions within the knowledge of a defendant are defensive matters. A corollary thereto is that one undertaking to state facts which lead to a definite conclusion, *i. e.,* that he is a citizen of the United States, must be held to have intended to represent that he was such a citizen unless facts are stated bringing himself within an exception. Such a statement might be that he was born to persons in the diplomatic service of a foreign nation temporarily sojourning here on a diplomatic mission or some other one of the unusual and rare circumstances which withhold constitutional acquisition of citizenship from persons born within the United States. Appellant contented himself with a series of answers which spelled out citizenship in the United States. The jury decided that he intended the officers to believe that he was a citizen of this nation. There is unrebutted testimony that Appellant, at another time, before an officer of the Immigration Service, stated that he was born in Russia [Tr. 156] and it was stipulated that Appellant was born in some unknown town in Russia

approximately forty years ago [Tr. 208], and has been a resident alien of the United States during all the times mentioned in the Indictment [Tr. 209].

This Court has emphasized that although the evidence established that the officer who questioned Appellant accepted Appellant's statements as representations of citizenship in the United States, that the combinations of words employed lacked a certain nicety of expression which the decision holds essential to a representation on the part of Appellant. If an officer is given answers which affirmatively state a series of facts combining to represent citizenship it follows that the giving of the series of representations must be a representation of citizenship and the only real question remaining is whether Appellant was wilful in leading the officer to believe Appellant to be a citizen of the United States. Such a question, being one of fact, would be for the jury.

A parallel exists between the case before the Court and *Taylor v. United States,* 167 F. 2d 752 (C. C. A., D. C. 1948). That was a case wherein the defendant was charged under a statute applicable to the District of Columbia with falsely claiming to be a member of the Metropolitan Police. In its Opinion the Court said, at pages 754-755:

> "Most serious of appellant's contentions is that the trial court erred in refusing to direct a verdict of acquittal 'because there was no proof that the defendant was not a police officer.' Appellant correctly asserts that the burden was upon the Government to prove the crime charged in the indictment beyond a reasonable doubt. The question is whether the Government sustained this burden to such an extent as to justify the trial court in permitting the case to go to the jury. Once the case was submitted to the jury

the questions of credibility of witnesses (where, as here, there was direct conflict in the evidence) and of reasonable doubt were for the jury.

"We consider the trial counsel for the Government exceedingly blameworthy in that he failed to offer the direct proof that appellant was not a police officer by the easy and conventional manner of proving such crimes, which is to say by putting on the witness stand an officer having charge of the official rolls and records of the Metropolitan Police and testifying from them whether or not appellant was at the time a member of that force. The Government failed to adduce this simple and convincing testimony.

". . . The burden was on the Government and remained on the Government, although *it is an established principle that where defendant is charged with falsely pretending to be an officer of the United States, and he fails to produce evidence showing he was such an officer, the presumption arises that the evidence, if produced, would have been unfavorable to defendant.* Scala v. United States, 7 Cir., 1931, 54 F. 2d 608, certiorari denied, 1932, 285 U. S. 554, 52 S. Ct. 411, 76 L. Ed. 943.

"The case, then, boils down to these simple propositions: 1. Did the Government, blundering in its presentation and ignoring the safe and simple but somewhat more troublesome method of proving its case, nevertheless produce sufficient evidence to justify the trial court in submitting the case to the jury? 2. Did the evidence submitted to the jury by the Government justify, in the light of *all* evidence, the verdict arrived at by the jury?

"It is our opinion that the evidence was sufficient and that it justified the verdict. Without exculpation of the Government's halting and feeble presenta-

tion of the case, we believe that it was possible for the trial judge, as the learned Justice who tried the case evidently did, to piece together enough evidence to justify him in allowing the case to go to the jury.

"*There was evidence that at no time, either in assuming to order the officers to move on or upon demand of the officers at the time of his arrest, did defendant show any credentials. He attempted to escape and threatened the officer with bodily harm if the latter attempted to stop him. When searched after his arrest he was found not to have a badge.*

"*From the evidence it was possible to piece together a case for the jury.* As was said by Judge Alschuler, speaking for the court in Scala v. United States, *supra:* 'While it must in some manner appear that the accused were not federal officers, this negative proposition is fairly inferable from character of proof much less direct and formal than might be required to affirmatively establish official capacity. Any facts and circumstances which to the average mind would fairly tend to indicate that these were not federal officers will be sufficient to warrant the jury in reaching such conclusion.' 54 F. 2d at page 609.

"We are of the view, therefore, from the evidence produced, that the trial court was justified in overruling the appellant's motion for a directed verdict and in submitting the case to the jury. To be sure there was direct conflict in the evidence, but that has been resolved by the jury. In our opinion there was sufficient evidence to sustain the verdict." (Emphasis added.)

See also, *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 683:

> "* * * There may be lurking in the dark of silence some unusual, unthought-of set of circumstances which would show a monstrous mistake has been made. But the evidence is barren of any suggestions of those who might know with respect to circumstances along that line, and any such circumstance can only be conjured up by the imagination."

It is a familiar principle of law that evidence of similar offenses is admissible to prove intent where intent is in issue (*Henderson v. United States, supra*). The Judgment of Conviction which has been affirmed (Count Three of Indictment No. 20064) is the earliest offense chronologically in the series with which Appellee was charged in this prosecution. This Court has held that the answer "Yes" to the question "United States citizen?" was a direct representation that Appellant was a citizen of the United States at the time he gave that answer. Under circumstances where at the first pertinent transaction Appellant represented he was a citizen of the United States, it can reasonably be taken that his intent in answering that he was a citizen of American nationality at a later time was also intended by him to be a representation that he was a citizen of the United States. The same result will follow as to the third representation in the chronological order of offenses. Failure of the police officer in making his inquiry to add the words "United States" to the inquiry "citizen," cannot supply a lack of understanding to Appellant who had already been asked in a police station whether he was a citizen of the United States and who then fitted his answers to the accompanying questions (*i. e.*, birthplace and length of time in this nation), to the same pattern of falsehood which he employed at the time

of his earlier false representation when the ultimate question "are you a citizen" was propounded to him with legalistic fullness of phrasing.

It is apparent from the foregoing that the trial jury and the trial judge resolved the question of fact against Appellant. If argument could dissuade the trier of fact from the inevitable conclusion that Appellant represented himself to be a citizen of the United States, the District Court was the forum and the trial jury the sole judge of the convincing strength of the evidence. The evidence is certainly capable of supporting the conclusion that Appellant represented himself to be a citizen of the United States. In *Fraina v. United States,* 255 Fed. 28 (C. C. A. 2, 1918), it was said, at pages 34-35:

> "Plaintiffs in error are really objecting to the weight of the evidence, and appealing to this court to override the jury's verdict, and therefore they print every word of the trial. We are not permitted to be concerned with that matter. Appellate courts, unless given power by statute, do not sit to correct the possible errors of the jury, but those of the court. *While it is the jury's duty to take the law from the court, and to apply that law to the facts as they find them* (Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343), *and it is the court's duty to see that there is some evidence tending to prove every element of the crime alleged* (Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726), *the jury's supremacy as to facts, including the inferences of fact drawn from proven phenomena, is unquestioned.* Indeed, even as to matters of law, Story, J., who is credited with establishing our present doctrine, instead of the theory that in criminal causes the jury judges both the law and the facts, admits the jury's 'physical power,' though not the 'moral

right,' to disregard the court's law. United States v. Battiste, Fed. Cas. No. 14,545, 2 Sumn. 240. If a verdict of acquittal in the teeth of the law be rendered, it must stand unreversed and unpunished since Bushell's Case, Vaughn, 135; and a verdict of conviction, though resting on inferences of fact that the judges would not draw, is assailable in an appellate court, only by demonstrating that reasonable men could not, as matter of law, be convinced beyond a reasonable doubt. The feat is always difficult, and we are far from finding it possible in this instance." (Emphasis added.)

This Court has declared the same rule in *Henderson v. United States,* 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

> "It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution, United States v. Manton, 2 Cir., 107 F. 2d 834, 839; Shannabarger v. United States, 8 Cir., 99 F. 2d 957, 961; Borgia v. United States, 9 Cir., 78 F. 2d 550, 555. * * *."

In the earlier case of *Coplin v. United States,* 88 F. 2d 652 (C. C. A. 9, 1937), this Court, at page 664, said:

> "With regard to the foregoing testimony, as well as much of the other evidence discussed by the appellants, it should be borne in mind that the question of weight and credibility is for the jury and not for the court."

See also, *Roberts v. United States,* 151 F. 2d 664 (C. C. A. 5, 1945), where it is said, at page 665:

> "We are not triers of fact. The law, in its wisdom, does not authorize this court to substitute the reactions as to the facts which it gains from a perusal of the cold, printed type for those of the lower court which saw and heard the witnesses, observed their demeanor on the stand, and thus was placed in far better position to know the true and false than this court; and where, as here, we cannot say that there was no substantial evidence upon which the verdict and judgment of the lower court was based, the verdict and judgment of the court below will not be disturbed."

In 1948 this Court reiterated its adherence to said principle in *Pasadena Research Laboratories v. United States,* 169 F. 2d 375 (C. C. A. 9, 1948), at page 380:

> "To clarify the matter for once and for all, we wish to restate plainly that *this court is not concerned with the weight of the testimony adduced below.* 'Questions of credibility were for the trial court.' * * *." (Emphasis added.)

It is respectfully submitted that the trial jury exercised an exclusive power to determine whether Appellant's multiple statements amounted to wilful representation of citizenship and that the uncontradicted testimony of officers who were before the jury established a combination of facts which, under the authorities above referred to, amounted to wilful false representations that Appellant was a citizen of the United States.

Wherefore appellee respectfully prays that this Honorable Court grant this Petition for Rehearing and that the Judgments of Conviction as to Count One of Indictment No. 20069 and the Indictment No. 20604 be, upon further consideration, affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,
Attorney for Appellee.

Certificate of Counsel.

I, counsel for the United States of America, appellee in the above-entitled cause, do hereby certify that the aforegoing Petition for Rehearing of this cause in our opinion is well founded and is not interposed for delay.

ERNEST A. TOLIN,
United States Attorney.